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**APR 16 2008**

**OFFICE OF PETITIONS**

In re Application of  
Muller et al.

Application No.: 09/403192

Filing or 371(c) Date: 01/13/2000

Attorney Docket Number: 81000.3000

DECISION ON  
PETITION

This is a decision in response to the "Petition to Request Withdrawal of the Holding of Abandonment Under 37 CFR 1.181(a)," filed November 28, 2007. The delay in treating this petition is regretted.

This Petition is hereby **dismissed**.

Any further petition must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under [insert the applicable code section]." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

**Background**

The above-identified application became abandoned for failure to timely and properly reply to the Final Office action, mailed February 23, 2007. The Office action set a three (3) month period for reply, and provided for extensions of time under 37 CFR 1.136(a). No reply having been received, the application became abandoned on May 24, 2007. A Notice of Abandonment was mailed October 10, 2007.

**Petition under 37 CFR 1.181**

Applicant petitions for withdrawal of the holding of abandonment, and in support of the petition states that the Office action was not received by the practitioner, and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed has also been attached to and referenced in practitioner's statement.

Applicant also states that a correspondence address change in connection with all patent cases associated with applicant's representative's firm was submitted in the early part of 2006, and files a change of correspondence address request with the present petition.

#### Applicable Law, Rules and MPEP

The MPEP 711.03(c)A, Petition To Withdraw Holding of Abandonment Based on Failure To Receive Office Action, provides

In Delgar v. Schulyer, 172 USPQ 513 (D.D.C. 1971), the court decided that the Office should mail a new Notice of Allowance in view of the evidence presented in support of the contention that the applicant's representative did not receive the original Notice of Allowance. Under the reasoning of Delgar, an allegation that an Office action was never received may be considered in a petition to withdraw the holding of abandonment. If adequately supported, the Office may grant the petition to withdraw the holding of abandonment and remail the Office action. That is, the reasoning of Delgar is applicable regardless of whether an application is held abandoned for failure to timely pay the issue fee (35 U.S.C. 151) or for failure to prosecute (35 U.S.C. 133). To minimize costs and burdens to practitioners and the Office, the Office has modified the showing required to establish nonreceipt of an Office action. The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. For example, if a three month period for reply was set in the nonreceived Office action, a copy of the docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action. The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail (e.g., if the practitioner has a history of not receiving Office actions). (Emphasis supplied)

#### MPEP 711.03(c)

#### Analysis

A review of Office records reveals that the Office action mailed February 23, 2007, was mailed to a correspondence address of record, 1501 Western Avenue, Ste., 100, Seattle Washington. The correspondence address change filed with the present petition changes the correspondence address to 1201 Third Avenue, Suite 330, Seattle, Washington. Applicant asserts that a correspondence address change in connection with all patent cases associated with applicant's representative's firm was submitted in the early part of 2006. A review of Applicant's cases associated with customer number 20601 reveals that the present application is not listed among

Applicant's cases associated with customer number 20601. Applicant has also not filed a copy of the correspondence address change submitted in the early part of 2006, and Office records for the present application do not contain a copy of the correspondence address change.

It is applicant's responsibility to provide this Office with the correct correspondence address. As provided in the MPEP 601.03, "[w]here an attorney or agent of record (or applicant, if he or she is prosecuting the application pro se) changes his or her correspondence address, he or she is responsible for promptly notifying the U.S. Patent and Trademark Office of the new correspondence address (including ZIP Code)."

Applicant has failed to demonstrate that a timely and proper change of correspondence address was filed. Accordingly, the petition to withdraw the holding of abandonment is dismissed.

Petitioner may file a request for reconsideration of petition and demonstrating that a timely and proper change of correspondence address was filed.

Alternate venue

Applicant may alternatively file a petition stating that the delay was unintentional. Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an "unintentionally" abandoned application without a showing that the delay in was "unavoidable." An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the required fee.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay can not make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revive under 37 CFR 1.137(b).


Further correspondence with respect to this matter should be addressed as follows:

By mail:                      Director for Patents  
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By FAX:                      (571) 273-8300  
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By hand:                      Customer Service Window  
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Telephone inquiries concerning this petition Decision should be directed to the undersigned at (571) 272-3232.

  
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Office of Petitions